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## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 769

THE SIOUX TRIBE OF INDIANS, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (R. 63–95) is not yet reported.

### JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered June 1, 1942 (R. 97). A motion for a new trial was denied October 5, 1942 (R. 97). The petition for a writ of certiorari was filed February 26, 1943, within the time as extended (R. 97). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended (28 U. S. C. sec. 288).

## QUESTIONS PRESENTED

1. Whether the Agreement of 1876 in which, for certain considerations, the Sioux Indians relinquished all claims to lands outside the reservation therein described constituted a taking of lands and rights granted by Treaty of 1868, when the Agreement was not approved by two-thirds of the adult male Indians as required by Article XII of the treaty.

2. Whether in any event the Indians relinquished all claims to such lands by the Agreement of 1889 which was approved in the manner prescribed by Article XII of the 1868 treaty.

## TREATY, AGREEMENTS, AND STATUTES INVOLVED

The material portions of the treaty, agreements, and statutes involved are set out in the findings as follows: The Fort Laramie Treaty of 1868, 15 Stat. 635, in finding 4 (R. 28–34); the Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176, in finding 17 (R. 55–56); the Agreement of 1876, as approved by Act of February 28, 1877, c. 72, 19 Stat. 254, in finding 19 (R. 57–61); the Agreement of 1889, as embodied in the Act of March 2, 1889, c. 405, 25 Stat. 888, in finding 21 (R. 62–63). The material parts of the special jurisdictional Act of June 3, 1920, c. 222, 41 Stat. 738, are printed in the opinion below (R. 69–70).

STATEMENT

Under authority of the Act of June 3, 1920, c. 222, 41 Stat. 738, the Sioux Tribe on May 7, 1923, filed a petition which, as amended on May 7, 1934, asserted a right to recover approximately $739,116,256 representing the value, with interest, of 73,781,826.19 acres of land alleged to have been taken by the United States (R. 1–20; see R. 23). The Government asked for dismissal of the petition (R. 21).

The undisputed facts, as found by the Court of Claims (R. 23–63), may be summarized as follows:

In 1868 the United States and the Sioux Tribe entered into the Fort Laramie Treaty. By Article II of this Treaty a certain territory known as the Great Sioux Reservation was "set apart for the absolute and undisturbed use and occupation" of the tribe. The western boundary of this reservation was located at the one hundred and fourth meridian of longitude.[1] For their part, the Indians relinquished "all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided." (R. 28–29.) Article XII provided that "No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as

[1] A map showing the reservation of 1868 and also the boundary established by the Agreement of 1876 may be found in the Government's brief in *Sioux Tribe* v. *United States* 316 U. S. 317, No. 798, October Term, 1941.

against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or intrested in the same; * * *" (R. 33). In Article XI the Indians reserved the right to hunt on certain lands outside the reservation "so long as the Buffalo may range thereon in such numbers as to justify the chase" (R. 32), and such hunting lands were designated "unceded Indian Territory" from which the United States agreed to exclude white settlers (art. XVI, R. 34).

The United States also agreed to provide schools, a carpenter, a blacksmith, and similar services (R. 29–30), to furnish each Indian with enumerated articles of clothing for thirty years (R. 31) and to furnish each Indian who settled on the reservation "for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at any earlier date" (art. X, R. 32). The appropriations for subsistence of meat and flour pursuant to this provision in the next four years totaled $5,295,761.91 (R. 54).

In 1874 an expedition discovered gold in the Black Hills region in the western part of the reservation (R. 35). When news of this discovery became public knowledge, white men invaded the Great Sioux Reservation in such numbers that it became very difficult to keep them out although every effort was made to conform to the treaty (R. 40–42). Negotiations were commenced in 1874

to obtain a relinquishment of the Black Hills portion of the Great Sioux Reservation and also of the hunting rights. The Secretary of the Interior stated that buffalo in sufficient numbers to justify the chase could no longer be found in the area. (R. 36.) In 1875 an agreement for relinquishment of the hunting rights in Nebraska was accordingly signed and, although Congress did not specifically ratify the agreement, the $25,000 consideration for such release was appropriated by Congress and was spent for the benefit of the Indians (R. 39–40).

Although the treaty obligation to furnish meat and flour subsistence expired in 1873, the Government continued to furnish such subsistence, $2,350,000 being appropriated for this purpose between 1874 and 1876 (R. 55; see also R. 50, 54). However, in 1876 Congress conditioned any further subsistence appropriations on the relinquishment by the Indians of their hunting rights and the Black Hills portion of their permanent reservation (R. 55–56). Act of August 15, 1876, c. 289, 19 Stat. 176. A formal agreement was accordingly negotiated in September and October 1876, providing for a relinquishment of hunting rights and a cession of 7,345,157 acres of land in the Black Hills (R. 34, 56). In return, the United States agreed to convey to the Indians an additional 900,000 acres of grazing land to the north of the reservation and to furnish specified rations to the members of the tribe "until the Indians are able to support themselves" (R. 62). Although

the chiefs and headmen of the various tribes signed this agreement, it was assented to by less than ten percent of the adult male Indians (R. 56). Congress ratified the agreement by the Act of February 28, 1877, c. 72, 19 Stat. 254 (R. 57). Since that time, Congress has appropriated approximately $43,000,000 in performance of its promise to furnish rations (R. 62).

In 1889 the Great Sioux Reservation was divided into separate reservations for the various bands of Sioux Indians (see R. 62). Section 19 of the Act of March 2, 1889, c. 405, 25 Stat. 888, 896, provided that all of the provisions of the 1876 agreement, not in conflict with the 1889 Act, "are hereby continued in force according to their tenor and limitation" (R. 62). As required by Section 28 of the 1889 Act, consent was given thereto by three-fourths of the adult male Indians in the manner provided by Article XII of the 1868 treaty (R. 63).

Upon these facts the Court of Claims concluded that petitioner was not entitled to recover (R. 63) and accordingly dismissed the petition (R. 97).

## ARGUMENT

The amended petition alleged that the United States had misappropriated three distinct classes (classes "A," "B," and "C") of lands totaling 73,781,826.19 acres (R. 10–11; see R. 23). Class "B" lands constituting 25,858,594.95 acres were outside the lands granted by the Treaty of 1868 (R. 11, 16–17, 34). Petitioner claimed such

lands under the Treaty of 1851. However, all rights to lands outside of those specifically mentioned in the 1868 Treaty were relinquished in that treaty (Articles II, XVII, R. 29, 34). See *Sioux Tribe* v. *United States,* 316 U. S. 317. Clearly, these class "B" lands have not been misappropriated. The claim has been abandoned, for no mention thereof is now made by petitioner.

1. The amended petition also claimed compensation for the alleged taking of the right to hunt over class "C" lands embracing 40,578,123.25 acres (R. 11, 17–18). Petitioner advances the theory (Pet. 21) that because the Agreement of 1876 was not approved by three-fourths of the adult male Indians, the Act of 1877 ratifying the agreement constituted a taking of the lands described therein. However, this agreement can have no application to the class "C" lands because Article XII of the Treaty of 1868 requiring the three-fourths consent to a cession of land applied only to the Great Sioux Reservation (R. 33). It did not limit the authority of the tribal chiefs to release hunting rights on lands outside the reservation. Hence, the Agreements of 1875 (R. 39) and 1876 (R. 57–61) signed by the chiefs and the headmen of the tribes releasing such rights were valid.[2]

[2] Moreover, the hunting rights were not perpetual but only lasted "so long as the buffalo may range thereon in such numbers as to justify the chase" (R. 32). In 1875 the Secretary of the Interior stated to the Indians that buffalo no longer appeared in sufficient quantity to make it worth while to hunt them (R. 36).

Petitioner's principal claim is for the alleged taking of 7,345,157 acres of Class "A" lands constituting the Black Hills portion of the Great Sioux Reservation.

Despite a contrary finding of the Court of Claims (R. 57), petitioner asserts (Pet. 25) that the 1876 agreement was signed under duress, contending that the United States was already bound to furnish subsistence. Such contention is without substance because an examination of Article X of the 1868 treaty, of which petitioner quotes only a part (Pet. 10), makes it plain that the obligation to furnish meat and flour subsistence was limited to four years and had therefore expired in 1873 (R. 32). Petitioner likewise fails to refer to the finding that the subsistence appropriations for 1874–1876 were in addition to those required by the treaty and were therefore gratuitous.[3]

Petitioner's contention (Pet. 21) that the failure to obtain the necessary three-fourths consent converted the Agreement of 1876, as approved

[3] The expenditures which have been made to fulfill the requirements of the 1868 Treaty are listed in *Sioux Tribe* v. *United States*, 85 C. Cls. 181, 192, certiorari denied, 302 U. S. 717. That case rejected a claim for alleged nonpayment of part of the $10 annuity provided for by Article X of the treaty. Similar claims for alleged failure to furnish goods or services under the treaty were rejected in *Sioux Tribe* v. *United States*, 84 C. Cls. 16, certiorari denied, 302 U. S. 740; *Sioux Tribe* v. *United States*, 86 C. Cls. 299, certiorari denied, 306 U. S. 642; and *Sioux Tribe* v. *United States*, 89 C. Cls. 31.

by the Act of 1877, into a taking is equally erroneous. The rule that property of an Indian tribe cannot constitutionally be confiscated by the United States without giving rise to a legal claim for just compensation (*United States* v. *Creek Nation,* 295 U. S. 103; *Shoshone Tribe* v. *United States,* 299 U. S. 476; and *Chippewa Indians* v. *United States,* 301 U. S. 358) only applies when the United States departs from its role as guardian and treats the Indian's property as its own. It does not limit the general rule that when action is taken by Congress as guardian for the benefit of the Indian wards, the manner in which Congress chooses to exercise its guardianship power may not be reviewed by the courts. *Klamath Indians* v. *United States,* 296 U. S. 244, 254–255; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 567–568; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 306–308; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497; *Chippewa Indians* v. *United States,* 88 C. Cls. 1, 32, affirmed, 307 U. S. 1. Cf. *Seminole Nation* v. *United States,* 92 C. Cls. 210, certiorari denied, 313 U. S. 563; *Creek Nation* v. *United States,* 92 C. Cls. 269, certiorari denied, 313 U. S. 581. Specifically, the question of whether an agreement ceding Indian land is valid notwithstanding that three-fourths of the adult male Indians have not consented to the cession as required by the previous treaty is "solely within the domain of the legislative authority and its action

is conclusive upon the courts." *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 568. The Act of 1877 was not, as petitioner asserts (Pet. 22–23), a taking under the power of eminent domain with an attempt by Congress to fix the amount of just compensation. Rather, as this Court pointed out in the *Lone Wolf* case, it was an exercise of Congress' power to change the form of investment of property administered by the Federal Government.

The consideration for the cession of the 7,345,157 acres included in the Black Hills portion of the Great Sioux Reservation and for release of the hunting rights (for which $25,000 had already been paid; see Statement, *supra,* p. 5) took the form of a grant of 900,000 acres of grazing land and the promise to furnish subsistence, which was essential to the Indians. This promise has resulted in the payment of $43,000,000 (R. 62). Congress determined that this constituted a fair consideration for the lands surrendered. This determination of Congress may not be reviewed by the courts even if it is believed that the consideration was inadequate. *Klamath Indians* v. *United States,* 296 U. S. 244.[4] Petitioner's reference (Pet. 23–24) to the special jurisdictional Act

[4] Under the circumstances of the instant case, the agreement clearly represented a fair exchange. Although gold was known to exist, the quantity and value thereof was, of course, indefinite. The Indians could not themselves extract

of June 3, 1920, c. 222, 41 Stat. 738, under which this suit was brought, does not indicate a different result, for its material provisions (R. 69–70) are identical, except for the Indians named, to those of the Act of May 26, 1920, c. 203, 41 Stat. 623, under which the *Klamath* case arose.

2. In any event, a subsequent agreement negotiated with the Sioux Tribe is a complete defense to petitioner's claim of an alleged wrongful taking based on the failure of three-fourths of the adult Sioux Indians to ratify the Agreement of 1876. In 1889 the Great Sioux Reservation was divided among the various bands of the Sioux Indians (see R. 62). Section 19 of the Act of March 2, 1889, c. 405, 25 Stat. 888, 896, provided that all of the provisions of the 1876 agreement not in conflict with the 1889 Act "are hereby continued in force according to their tenor and limitation" (R. 62). As required by Section 28 of the 1889 Act, consent was given thereto by three-fourths of the adult male Indians (R. 63). This constituted a re-execution of the 1876 agreement. It is, therefore, immaterial that the cession of hunting rights and lands in the Black Hills Region was not signed by the requisite number of

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the gold, for skillful workmen and capital were required (R. 47). On the other hand, "A failure to receive Government rations for a single season would reduce them [the Indians] to starvation" (R. 50). Thus, in 1876 the subsistence was of much greater value to the Indians than this relatively small portion of the lands they owned.

Indians in 1876. Having ratified the 1876 agreement in 1889 and having accepted the benefits thereunder for more than sixty-five years, petitioner cannot now complain of the manner in which that agreement was originally executed.

## CONCLUSION

The decision of the court below is correct and presents no conflict of decisions or questions of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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